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No. 2

In the Supreme Court of the United States

October Term, 1935.

BAYSIDE FISH FLOUR COMPANY,
Appellant,

vs.

J. DALE GENTRY, EARL B. GILMORE, I. ZELLERBACH, et al.,
Appellees.

STATEMENT AND BRIEF FOR APPELLANT.

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STATEMENT AND BRIEF FOR APPELLANT.

SPECIFICATION OF ASSIGNED ERRORS AS ARE INTENDED TO BE URGED.

The appellant presents to the Court as grounds for review the following assigned errors:

(1) The Court erred in denying the appellant's application for an interlocutory injunction.

(2) The Court erred in granting appellees' "Motion to Dismiss" bill of complaint.

(3) The Court erred in not granting an interlocutory injunction to the appellant on its application therefor.

(4) The Court erred in holding that appellees' Motion to Dismiss should be granted.

(5) The Court erred in not holding that the appellant was entitled to the interlocutory injunction applied for.

STATEMENT GROUNDS OF JURISDICTION.

The original bill of complaint alleged that the defendants are officers of the State of California, charged

with the enforcement of the "Fish and Game Code," revising and consolidating the law relating to fish and game and other wild life, and repealing certain provisions of law therein specified, passed by the 50th State Legislature of the State of California, approved April 11, 1933, and effective August 21, 1933. That the act was in conflict with the constitution of the United States, in the several particulars set out in the bill of complaint, to-wit: the commerce clause of the constitution of the United States; also paragraph 2, article 6 of the constitution of the United States, providing that the constitution of the United States and the laws thereof should be the supreme law of the land; the fourteenth amendment to the constitution of the United States prohibiting any state from depriving any person of life or property without due process of law, and prohibiting a state from denying any person the equal protection of the law (R. 1-19).

A three-judge court, which was duly organized on the hearing of the application for the interlocutory injunction denied the application and granted defendants "Motion to Dismiss Bill of Complaint" (R. 43-50). This order was dated September 1, 1934. Petition for appeal was filed; an order allowing appeal to this court was granted. The order is dated October 2, 1934, signed by the three judges (R. 51-53). The appeal was perfected; assignment of errors will be found (R. 52-53). The points relied on by plaintiff in error are referred to in its "Statement as to Jurisdiction" and at (R. 52). This appeal is prosecuted from the decree of the three-judge court to this court under section 380 U. S. C. A., being section 266, Judicial Code, as amended Feb. 13, 1925,

the material portion of the act being contained in paragraph 380 thereof and followed in the cases of *Foster Fountain Packing Company* vs. *Haydel,* 278 U. S. 1; *Johnson* vs. *Haydel,* 278 U. S. 16, and pertinent authorities cited therein.

STATEMENT OF FACTS.

This suit was begun in the United States District Court, Southern Division of the Southern District of California, by the Bayside Fish Flour Company, a California Corporation, by an original bill in equity filed in said court, wherein the California Fish & Game Commission, the Attorney General and the Commission's Executive Secretary, were made defendants (R. 1).

The defendants constitute the enforcement officers of the State of California charged especially with the enforcement of the laws hereinafter complained of (R. 13).

The bill of complaint which is found at pages 1 to 19 of the record, claimed the jurisdiction of a Court of Equity of the United States on account of threatened, irreparable harm, injury and damage and in a matter wherein the amount involved was over three thousand dollars and was a controversy arising over the constitution and laws of the United States, and specifically all that part of the constitution and laws of the United States as is set out in the bill of complaint on pages 1-5 of the Record.

It is charged that Sections 1060, 1064, 1065 and 1076 of said Fish and Game Code are in contravention of the constitution of the United States, and in support of this proposition set up; that the Bayside Fish Flour Company is engaged in the business of purchasing fresh

or raw sardines from fishermen domiciled in the states of Oregon and Washington and engaged in catching fish upon the high seas of the Pacific Ocean beyond the three-mile limit, and beyond the jurisdiction of, the State of California, and after said fish are brought within the State of California, appellant then manufactures an edible product, to-wit: fish flour for human consumption from the meat of said sardines. That other fishermen also bring their product within the State of California, sell same to tin-canners who ship their product, out of the State of California, in interstate and foreign commerce. That plaintiff only manufactures and sells its product in interstate and foreign commerce. That fish flour and canned sardines are used as food in all parts of the United States and foreign countries, their chief value arises after being packed and shipped in interstate commerce to all parts of these United States and in foreign countries. That this business is centered around Los Angeles, Monterey and San Francisco, there being twenty other plants engaged in the business of canning and processing sardines into cans, fish meal for other than human consumption and fish oil for non-edible purposes.

That sardines have no value as a food product in their natural state and that approximately 97½ per cent of the canned sardines are shipped out of the State of California in both foreign and interstate commerce.

That sardines are a migratory fish, whose real home is unknown, they being found all over the waters from the lower part of Mexico up as far as Alaska and as far west as Japan; and as far as is known to science, the said sardines spawn upon the open seas and are found in

unlimited numbers in the Pacific Ocean outside of the three-mile limit of the State of California.

That the common method of catching sardines is for purse seine boats to go out into the Pacific Ocean and by means of a net, to catch these sardines which are then sold to the canners, where they are cleaned, cooked and packed in cans and sacks and thereafter being shipped to all parts of the world. That in canning the sardines, only about one-half, or the middle section of the fish, is used for canning purposes; the heads, tails and other offal of the sardine is used to manufacture a fish meal, which is a stock and chicken food, and fertilizer, and fish oil, which is used to manufacture soap and fat for many purposes other than for human consumption.

That the Bayside Fish Flour Company is engaged in the business of manufacturing a fish flour, fit for, and used for human consumption, and shipped in interstate and foreign commerce; that it uses all of the flesh of the fish to manufacture its product, and the deleterious matter then is manufactured into fish meal and sardine oil, similar to that used by the tin-canners. That plaintiff contracted with fishermen from other states, of the United States, to-wit: Oregon and Washington, to deliver sardines to its plant during the packing season 1933-1934.

That the Bayside Fish Flour Company had a large plant and equipment of the approximate value of $65,000 and employed a great number of men, and unless the supply of sardines under the terms of the contract attached to the bill of complaint can be obtained and used its business will be destroyed, its plant rendered valueless and its employees thrown out of employment.

That the State of California threatens to interfere with the performance of this contract and to prosecute the Bayside Fish Flour Company, its agents, servants and employees.

That the part of said Fish and Game laws complained of is 1060-a (R. 19-20); 1064 (R. 20); 1065 (R. 20-21), and 1076 (R. 23-24).

That section 1410 (R. 24) provides certain penalties for a violation of said Fish and Game laws.

The bill of complaint shows that Sections 1060-a, 1064, 1065 and 1076 of the Fish and Game Code violates the 14th amendment of the Constitution of the United States for the reason that while the Bayside Fish Flour Company operates a fish-flour plant for the manufacture of a food product within the State of California and is a corporation organized and domiciled in said State, it still is unable to purchase sardines caught upon the high seas and beyond the three-mile limit, and/or jurisdiction of the State of California, because they do not operate a tin-canning plant, and there is no provision made in the law to permit it to secure a permit for the purpose of operating its food processing plant. That therefore the said complainants are denied the rights and immunities as citizens and the equal protection of the law and are deprived of their property without due process of law. That it would be a great hardship on the Bayside Fish Flour Company to change their machinery and equipment over from a fish flour plant and discard same, to a tin-canning plant, and if, and when, said plant was changed to a tin-canning plant the same could only be operated at a great loss, for the primary reason that all

the profit is made from fish meal and fish oil, not used for human consumption (R. 41).

The bill of complaint further shows that only a negligible quantity of the meat of the sardines is conserved for food purposes under the provisions of the Fish and Game Laws, and that only 14.3 per cent of the sardines taken by canners was used to manufacture a food product during the two seasons 1932-1934, and that 85.7 per cent was used for straight reduction purposes to manufacture fish meal and fish oil for other than human consumption (R. 25), and that of this 14.3 per cent put into tin cans between 90 per cent and 97½ per cent was shipped outside of the State of California into interstate and foreign commerce; therefore, only .715 per cent of the tin-canned sardines was used by the people of the State of California for food purposes, while 13.585 per cent was shipped in interstate and foreign commerce. Or, for example, if a tin-canner takes 1000 tons of raw sardines from the waters of the State, he uses 857 tons of sardines to manufacture non-edible fish meal and fish oil and only uses 143 tons in tin cans for edible purposes; he then would ship approximately 135.85 tons, or 95 per cent of said tin cans in interstate and foreign commerce, leaving only 7.15 tons to be used for food purposes by and for the people of the State of California out of the original 1000 tons of raw sardines taken from the waters of the State, or less than .7 per cent of 1 per cent of the original take are for the people of the State.

The bill of complaint further shows that the parties defendant are officers and agents for the State and the Fish and Game Commission of the State of California, charged with the enforcement of the fish and game laws

of the State, and while denying that any part of the law complained of is valid, complainant expressly offered, and did pay, all taxes, licenses, and only take and use sardines in their plant during the open season, and further only used sardines caught upon the high seas and beyond the jurisdiction of the State, and generally offer to do equity as required by the court.

The bill concludes with the prayer that a temporary restraining order issue and that a statutory court of three judges be formed, and that upon a hearing pending the final hearing a temporary injunction issue and that upon the final hearing this injunction be made permanent, and for other and general relief fully set out and requested, as found on pages 18 and 19 of the Record, which bill of complaint is duly signed by the solicitor of record and sworn to by the proper officer of the complainant company, attaching thereto as an exhibit the contract and the full complete act complained of, the contract being found at page 42, and four other agreements, by reference, at page 40, and the law complained of being found at pages 19-24 of the Record.

The defendants only filed a motion to dismiss the bill of complaint, and did not file any answer supported by controverting affidavits (R. 43).

At the hearing of the motion for an injunction pending the final hearing of said cause, the complainants offered proof in the form of numerous affidavits substantiating fully each and every allegation of the bill of complaint, these affidavits being the affidavit of R. L. Daily (R. 26-32); affidavit of Edward David (R. 32-34); affidavit of Joseph G. Gisler (R. 34-35); affidavit of John R. Grigg (R. 35-37); affidavit of E. W. Lockwood (R.

38); affidavit of E. T. Meekin (R. 39); affidavit of Y. Worrall (R. 40-43), all of which affidavits taken as a whole show proof of the following facts:

That plaintiff is using a patented process (R-24A) for manufacturing fish flour for human consumption out of sardines and has been operating a plant for the past ten years. That under the fish-and game laws the fish and game authorities were required to issue a permit limiting the tonnage taken for such purposes and that in order to obtain such a permit the commission held quasi-judicial hearings to determine the use plaintiff was making of its product (R. 26-27). That during the year 1930, under the law before it was amended, the people of the State of California filed an action in its courts alleging that plaintiff was operating a reduction plant, which case was decided in favor of this appellant and against the appellee and became final (R. 27-28); that the term "Reduction Plant" was in the same language under the old law as is now contained in the present Fish and Game Code. That during the ten-year operating period plaintiff shipped all of its commodity to Europe and expended approximately $25,000 in building up its good will and stimulating its sales (R. 30).

That according to the usage of the trade "Reduction Plant" was always used and understood to mean products for use for purposes other than human consumption; that plaintiff is the only plant in the State of California manufacturing fish flour for use for human consumption (R. 32-34, 37-39).

That the Fish and Game Commission of the State of California operates a patrol boat to watch the fishermen upon the high seas in order that the fishermen do not

catch sardines within the waters of the State of California within the three-mile coast lines, and that it is practicable for this patrol to keep the fishermen out of the waters of the State of California. That outside of the three-mile limit there are straight floating reduction plants catching and using over fifty thousand tons of sardines per season and manufacturing said sardines into a non-edible product (R. 34-35, 36-37).

That the plaintiff has contracts with fishermen domiciled in the states of Oregon and Washington (R. 40), and that said fishermen only caught their sardines in the Pacific Ocean beyond the three-mile jurisdictional limit of the State of California, and that the only sardines used by plaintiff were taken out of the Pacific Ocean and not from the waters of the State of California. That none of the commodity is used, or intermingled, with intrastate commerce; that the operations of the plant were interfered with and stopped by the people of the State of California (R. 40).

That it is a recognized fact, according to the records of the Fish and Game Commission, that there is no profit in putting sardines in "tin cans" and the straight canners sell their canned sardines at less than cost for the purpose of securing a greater tonnage of sardines to manufacture fish-meal and fish oil from the offal and the 32½ per cent allowed them by law to be used for straight reduction purposes (R. 41).

That at no time has plaintiff shipped or intermingled any of its fish flour with intrastate commerce of the State of California.

The proof showed that the law was a subterfuge enacted from its inception simply for the purpose of

enabling canners to stimulate the canning of sardines at a loss in order that the larger profit might be made on the percentage used for reduction purposes until the sardine catch reached the unprecedented amount of 322,600 tons of sardines; and the theory that the sardine catch would be limited by the amount of canned sardines the markets would absorb, did not work. The price of canned sardines declined still further below the cost of production (R-41).

Upon the hearing in this case the State of California did not offer in rebuttal any evidence of any character or kind but relied solely upon their Motion to Dismiss (R. 43).

After the final hearing was had by the court, a decree was rendered with a written opinion by the court (R. 46-49), the necessary procedure was taken to appeal to this court and this case is here on direct appeal from the decision of statutory court below refusing to grant the relief prayed for in the bill of complaint, that is, refusing to grant the temporary injunction prayed for therein.

ARGUMENT.

POINT I

The Legislature of a State Cannot, Under the Guise of Exercising Its Police Power, Directly Interfere with Interstate Commerce.

It is the contention of plaintiffs in error that the act in question was not passed by the Legislature of the State of California in the exercise of its legitimate police power; that the act in question was not passed with a view to conserving the natural resources of the State; that the act has no relation to the conservation of the

natural resources of the State; that the act is merely a subterfuge, attempted to be clothed with appropriate language which was done to make it appear as a conservation measure, but in fact, it was passed for some ulterior purpose, and in its natural enforcement was intended to and does place a direct burden upon interstate and foreign commerce. In order for this act to be a true conservation measure it should limit the *take* of fish, and not the *use* to which the fish may be put after they are taken from the waters of the State. To use a homely simile, supposing all of the sardines of the State were confined within one enclosure and consisted of 1000 tons of sardines whose yearly propagation amounted to 100 tons, then it would be a conservation measure to permit the TAKING of only 100 tons annually from the fishery and thus conserve the original 1000 tons of sardines for the use of posterity; therefore, how can it be said that such a measure would be a conservation measure if it permitted any person who put the sardines in tin cans to take the whole 1000 tons of sardines from the waters of the State provided they only used 32½ per cent for straight reduction purposes, and in preparing said sardines for canning in cutting off the heads would not use more than 50 per cent of each fish in a reduction plant. It is the TAKING of the sardines from the waters of the State that regulates conservation, and not the USE after the taking, which depletes the species. Any legislation regulating the USE for peoples other than the citizens of the State of California is not to conserve said natural resources for the benefit of the people of the State and its future generations.

The case of *Foster Packing Company* vs. *Haydel*, 278

U. S. 1, and the authorities cited therein, sustain said theory.

The legislative enactment under review bears no relation to conservation of resources. Sardine canners, upon obtaining a license, may use ALL the sardines within their capacity during the open season (R. 21, Sec. 1065). Such canners have no limitation placed upon their tonnage take, and may take all the sardines they want without reservation or restriction, so long as they put a certain percentage in *tin cans* and may ship the entire output out of the State without restriction or reservation; nothing is required to be kept within the State.

Interstate commerce comprises not only shipment of property from one state to another, but also protects the dealings, negotiations and contracts in respect thereto. *Foster Packing Co.* vs. *Haydel,* 278 U. S. 1, 10.

This Court Will Investigate the Record and Determine for Itself as to Whether or Not Appellants Have Been Deprived of a Constitutional Right.

In the case of *Truax* vs. *Corrigan,* 257 U. S. 312, the court used the following language:

> "The facts alleged are admitted by the demurrer, and, in determining their legal effect as a deprivation of plaintiffs' legal rights under the 14th Amendment, we are at as full liberty to consider them as was the state supreme court."

In *La Coste* vs. *Department of Conservation,* 263 U. S. 545, this court used the following language:

> "This court will determine for itself what is the necessary operation and effect of a state law challenged on the ground that it interferes with or bur-

dens interstate commerce. . . . Regard must be had to the substance of the measure rather than its form."

POINT II

Sections 1064, 1065 and 1076 of the Fish and Game Code Violate the 14th Amendment of the Constitution of the United States in That Plaintiff in Error Is Deprived of Its Property Without Due Process of Law.

The Fish and Game Code of the State of California violates the 14th Amendment of the constitution of the United States for the reason that the Bayside Fish Flour Company is denied the right to purchase sardines from citizens of other states of the United States taken from the Pacific Ocean beyond the jurisdiction of the State of California, during the open season and brought within the State and then sold and transported in interstate and foreign commerce only, unless the Bayside Fish Flour Company shall acquire and operate a tin-canning plant at a loss within the State of California, thereby depriving it of its property without due process of law.

The right to *contract is* property, and is protected by the 14th Amendment to the constitution of the United States. *Truax* vs. *Corrigan,* 257 U. S. 312.

The right of property includes the right to acquire, *use* and dispose of it. *Buchannan* vs. *Worley,* 245 U. S. 861.

The right to contract is property, protected by the 14th amendment to the constitution of the United States. *St. Louis Cotton Compress Co.* vs. *Arkansas,* 260 U. S. 346.

A statute cannot regulate arbitrarily a material to be *used* in the manufacture of beds. *Weaver* vs. *Palmer,* 270 U. S. 402.

A state may not, in the guise of protection of the public, arbitrarily interfere with private business or impose unreasonable, unnecessary restrictions upon them. *Jay Burns Baking Co.* vs. *Bryan, Gov. of Nebraska,* 264 U. S. 504.

As there is no question of the public safety, public health, or public morals and where the prohibited act of the plaintiff is not malum in se, the absolute prohibition, by the State authorities, of the USE of plaintiff's own property cannot be held to be a reasonable exercise of the police power. *In re Marshal.* 02 Fed. 323.

POINT III

Sections 1064 and 1065 of the Fish and Game Code Violate the 14th Amendment to the Constitution of the United States in That They Deny to the Complainant in Error the Equal Protection of the Law, if Such Sections Shall be Construed so as to Prohibit the Bayside Fish Flour Company from Purchasing and Using Sardines for the Purpose of Making a Fish Flour for Use for Human Consumption in That Such Construction Would Deprive Them of the Equal Protection of the Law.

Dealing with the question of the title and use of the State in fish (a natural resource), it only holds the same as trustee for the people of the State, which trust must be administered without discrimination.

In *Gratz* vs. *McKenzie,* 258 Fed. 338 (8th Circuit Court of Appeal), Mr. Justice Garland, as organ of the court, said:

> "Fish, generally speaking, on account of their migratory character and for want of a fixed habitat, are classified as animal ferrae naturae. Their ownership, while they are in a state of freedom is in the State, not as proprietor, but in its sovereign ca-

pacity as the representative and for the benefit of all its people in common and the ownership may not be claimed by any particular individuals."

The leading case in the State of California on this subject, and the case which defined the term "reduction plant" prior to the passage of the present act, and which is deemed to be read in conjunction with the act itself, is the case of *People* vs. *Monterey Fish Products Company,* 195 Cal. 548, wherein it is stated:

"The public policy of this state in its relation to the food fish *within* its waters has been clearly, consistently and unmistakably manifested throughout the history of its fish and game legislation. It aims at the protection and conservation of food fish for the benefit of the present and future generations of the people of the state AND THE DEVOTION OF SUCH FISH TO THE PURPOSES OF HUMAN CONSUMPTION.

"It is plain that the purpose and intent of the act is to prohibit preventable waste of food fish, to discourage, and so far as practicable to prevent, THE USE THEREOF FOR ANY PURPOSE OTHER THAN HUMAN CONSUMPTION AND TO AFFIRMATIVELY ENCOURAGE THE USE THEREOF FOR THIS PURPOSE. With this item of public policy in mind it is apparent that the purpose of the proviso which is here claimed to be unreasonable and discriminatory is to *aid and encourage those who are engaged in* catching and PREPARING FISH FOR HUMAN CONSUMPTION and that no reason exists for the giving of such aid and encouragement to those who are engaged in *diverting* food fish to other uses."

An examination of the reports prepared by the Fish and Game Commission (R. 25) will show in what man-

ner the fish and game laws are only used as a subterfuge for the particular purpose of permitting only plants using "tin cans" to take and use sardines.

The canners first cut their fish and take off their heads and tails, thus fifty (50%) per cent of the entire take is not used for human consumption; then they also take 32½ per cent of the total take of the whole fish and put in their reduction plant, for use for other than human consumption, under Section 1066 (R. 21); then, further, under Section 1068 were granted 6000 tons additional to be used for products other than for human consumption (R. 29).

Thus it will be seen that in two operating seasons the tin-canners took from the waters of the State of California 468,667 tons of sardines. They used 401,577 tons of sardines for purposes other than for human consumption and only used 67,090 tons for human consumption (R. 25).

Of the amount of sardines put in tin cans practically all of it was shipped out of the State (R. 33), and less than one (1) per cent of all the fish put up by the tin-canners were actually used by the people of the State of California and the balance was used and devoted to purposes for other than human consumption, and transported and sold by said canners in interstate and foreign commerce.

Under the construction placed upon the act by the Commission this plaintiff is not permitted to do the same thing with the fish BROUGHT WITHIN THE STATE AND TAKEN UPON THE HIGH SEAS and the Commission refuses to issue a permit to it to manufacture FISH FLOUR FOR USE FOR HUMAN CONSUMPTION to be shipped out of

the State into intrastate and foreign commerce, irrespective of the fact that none of the fish, or commodity becomes intermingled with the commerce of the State of California.

Therefore, it is our contention that the exception contained in Section 1064 (R. 20), "except as allowed by this code, it is unlawful to use any fish, or part thereof, except fish offal, in a reduction plant or by a *reduction process,*" is unconstitutional because it prohibits the plaintiff from using a "reduction process" in manufacturing its product. Also, that Section 1065 (R. 21), only permits a packer to use fish in a "reduction plant" used in connection with the operation of a tin-canning plant, while it prohibits this plaintiff from doing the same thing because it does not pack its product in a tin can but only uses a "flour sack."

Both this plaintiff and the "tin-canners" are food manufacturers because they are putting up a product for use for human consumption, and there is no reasonable classification upon which to predicate a distinction between a "tin can" and a "flour sack." The tin-canner is permitted to operate and take all the sardines he wishes WITHOUT LIMIT as to quantity and/or number. The flour-sacker is denied the same right to participate in the distribution of the public domain while the canner, through the assistance of the Commission is permitted to use the law as a subterfuge by putting its fish in a tin-can rather than a flour sack. The erection and operation of a canning plant would have no relation whatever to the conservation of the natural resources, because it would necessarily be contemplated that such commodities would all be shipped in interstate and for-

eign commerce and only a negligible quantity would remain within the State for the use of the people of the State, therefore, the alleged distinction has no relation in any true sense of the legitimate exercise of the police power of the State. AND FURTHERMORE, NONE OF THE FISH USED BY THIS PLAINTIFF IS TAKEN FROM THE WATERS OF THE STATE OF CALIFORNIA, but they are all taken from the high seas of the Pacific Ocean, and in no way shape or form tend to deplete the supply of the fish of the people of the State of California.

In the case of *Royster Guano Co.* vs. *Virginia,* 253 U. S. 412, this court, in part, used the following language:

> "The classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the *object* of the legislation, so that all persons similarly circumstanced shall be treated alike."

As the Supreme Court of the State of California, in the case of *People* vs. *Monterey Fish Products Company,* 195 Cal. 548, has judicially declared that the purpose and intent of all fish and game legislation is to prevent the use of fish for any purpose other than human consumption and to affirmatively encourage the use thereof for this purpose and further holds that the giving of aid and encouragement to those who are engaged in *diverting* food fish to other uses, it will be seen that the legislative declarations of purpose in its practical operation and construction directly burdens or destroys interstate and foreign commerce, and is only used as a subterfuge to build up class legislation and deprive all the

citizens of the State of California with the equal protection of the law.

POINT IV

The Lower Court in Passing Upon the Application for Preliminary Injunction Disregarded the Rules of Law of This Court Stated in the Cases of *Foster Fountain Packing Company* vs. *Haydel*, 278 U. S. 1, and *Johnson* vs. *Haydel*, 278 U. S. 16.

The allegations of the complaint substantiated by supporting affidavits, uncontradicted, all brought this case within the rules laid down in the two foregoing decisions and the lower court's refusal to grant a temporary injunction was contrary to a rule of equity and was the result of improvident exercise of judicial discretion.

The facts alleged in the complaint, the details set forth in our affidavits and the provisions of the Fish and Game Code to be restrained, showed that the conservation of sardines is only a feigned and not the real purpose of the act. They support the plaintiff's contention that the purpose of the enactment is to prevent the interstate and foreign movement of products manufactured from sardines by this appellant in order to limit that right to tin-canners who do not use their product for the people of the State of California but deal almost entirely in interstate and foreign commerce, and through the subterfuge of operating a tin-canning plant indiscriminately and without limitation, take and use sardines from the waters of the State. The enforcing officers of the State will not allow appellant to take fish from the waters of the State to manufacture a food product but are going further and say we cannot take the

fish upon the high seas and outside their jurisdiction, although we at no time intermingle the raw fish, or the product, with interstate commerce.

We are challenging the validity of the State enactment on the ground that it is repugnant to the commerce clause, is class legislation and that we are not bound by the legislative declarations of purpose, and it is open to us to show that in its practical effect and operations its provisions directly burden and destroy interstate and foreign commerce. As interstate commerce includes more than transportation but embraces all the component parts of commercial intercourse the statute involved operates, not only to discriminate, but directly to burden interstate commerce and is invalid.

All the citations referred to in the opinion of the lower court (R. 46-49), are distinguishable and none of them are essentially like this one. The lower court overlooked the practical operation of the law, and only looked at the legislative declaration of policy. Upon the face of the law it appears to be a conservation measure, while in its practical operation, it is a *destructive* measure, and in its destruction of the natural resources of the State is also building up a class preference; it does not in any manner or form prohibit the manufacture and use of fish products in interstate commerce provided one is a tin-canner. The State does not require that any part of the sardines, or their resulting products, be retained for consumption or use therein. Indeed only a minute part is consumed or used within the State. Consistently with the act all may be, and in fact practically all is sold and used in interstate and foreign commerce. As to such sardines so used, the commodities manufac-

tured therefrom, the protection of the commerce clause attaches at the time of *taking*.

By permitting sardines to be taken and practically all of the products thereof to be shipped and sold in interstate commerce, the State of California necessarily released its hold, and as to the sardines so taken, definitely terminated its control. Such authorization and the taking and using in pursuance thereof put an end to the trust upon which the State is deemed to own or control the sardines for the benefit of its people.

As the sardines used by this appellant were all caught upon the high seas the fishermen acquired an *absolute property right therein,* when this plaintiff purchased such fish from them, it also acquired their title of an absolute property right and was entitled to use said fish in the legitimate channels of commerce and at no time did it intermingle said fish or commodities with the commerce within the State of California, and therefore did not come within the rule of law laid down by the Circuit Court of Appeals, Ninth Circuit, in the *Van Camp Sea Food Co.* vs. *Department of Natural Resources,* 30 Fed. (2d) 111, or any of the other cases cited. Each and every case cited to sustain the opinion is readily distinguishable.

The *Van Camp case,* 30 Fed. (2d) 111, only lays down the rule as to USE where the power is exercised in good faith, and for the purposes of CONSERVATION and not for the purpose of evading the commerce clause or other provisions of the Federal Constitution. It also only applies where a SUBSTANTIAL PART OF THE FISH ARE TAKEN IN LOCAL WATERS OF THE STATE..

The case of *Paladini* vs. *Superior Court;* 178 Cal. 369,

also dealt only with the fish taken *within* the waters of the State, in that case Paladini did not acquire an absolute property right in the fish taken, but only acquired a limited right under a privilege granted by the State. In our case the fisherman acquired an absolute property right in the fish themselves which ownership was transmitted to the appellant.

In *People* vs. *Stafford Packing Co.*, 193 Cal. 719, the court was only interpreting the wrongfulness as an invasion of the property rights of the people of the State of California, i. e., the fish within the borders of the State proper. In this case the fish caught upon the high seas do not belong to the people of the State of California, but to the parties who reduced them to possession, so long as said fish are not intermingled with the fish taken from the waters of the State.

The case of *People* vs. *Monterey Fish Products Co.*, 195 Cal. 548, was incorrectly interpreted by the lower court as being against this appellant, because it shows that the legislative declaration of purpose is to keep the fish within the State of California for the use of the people of the State, and the object of the law is to preserve the fish for the present and future generations, not to permit tin-canners to use a law as a subterfuge to destroy said fisheries. It was decided upon the assumption that the tin-canners were not using the law as a subterfuge and were not wasting the food fish by using the same in a reduction plant for the conversion thereof into fish meal and fish oil, while in the particular case now before this court the affidavits show that the tin-canners are using the law as a subterfuge against the property of the people of the State of California.

In *Ex Parte Bailey,* 155 Cal. 472, only the question of proprietary interest between the people of the town of Santa Monica and the State itself was in issue. We take our fish only from the high seas, and do not take any from the waters of the State of California.

In *Ex Parte Kenneke,* 136 Cal. 527, the quail act specifically inhibited sale, said quail was not to be an article of commerce, and the qualified property was further limited to the particular use and prohibition in interstate and foreign commerce. No such inhibition applies here.

In *Ex Parte Maier,* 103 Cal. 476, the statute places an absolute inhibition upon selling of ANY deer, while the act in question in this case has no such inhibition, and gave to the qualified owner the right of USE the same as all other citizens of the State and did not discriminate, while in the statute now before this court, it only permits the USE by tin-canners, and prohibits any other processer doing exactly the same thing the tin-canner does. Neither are we bringing fish within the State during the closed season, but comply with the law in every respect relative to SEASON, licenses, taxes, and all other requirements.

In *Suttori* vs. *Peckham,* 48 Cal. App. 88, the court limited the decision to fish taken within the waters of the State and Suttori was not the absolute owner of the fish because he only had a qualified right as the ownership of said fish always rested in the people of the State. The people of the State of California have no such ownership in the fish used by appellant because said fish are caught upon the high seas, and contracted and purchased from citizens of other states.

In the *Phoedovius case,* 177 Cal. 238, the statute absolutely prohibited the SHIPMENT of game, while in this case no such inhibition applies. The court defined the sole purpose of the enactment of the protection of game is to protect the game for the use of the people of the State. We are not taking or using any fish from the waters of the State of California and are not depriving the people of any property right, neither are we intermingling our fish with fish caught within the State so as to make it impossible to distinguish between said fish.

In the case of *People* vs. *Truckee Lumber Co.,* 116 Cal. 397, the fish were taken from the waters of the State of California and not from without the jurisdiction of the State, as is done in the case before this court.

The lower court also misconstrued the meaning of "reduction plant" contained in Section 1060 (R. 19), by placing too broad a construction upon said phrase, and entirely overlooked the judicial interpretation of a similar phrase by the Supreme Court of the State of California in the *Monterey Fish Products case,* 195 Cal. 548, where the court defined the same phrase to mean any plant used in the manufacture of products for other than human consumption, and also defined waste to designate and apply to the use of fresh food fish for any other purpose than human consumption.

Also in examining the definition in the act itself, it can readily be seen that the phrase "fish-flour" as used there means a meal for use for other than human consumption, because of the other affiliated products contained in said definition and tracing their further uses in the act itself. Section 1064 (R. 20) uses the phrases "reduction plant" or "reduction process" in connection

with "fish-offal," and every one knows that "offal" appertains to non-edible articles. Section 1066 (R. 21) uses the phrase "reduction-plant" as a plant for the manufacture of non-edible articles. The same interpretation applies in Section 1067 (R. 21), and Section 1068 (R. 21), states that no reduction of fish shall be permitted which may tend to deplete the species, or result in waste or deterioration of fish. The *Monterey Fish Products case,* supra, defines the term waste as "designed to include and to apply to the use of fresh food fish for any purpose other than human consumption.

The facts claimed by appellant, and the practical operation and enforcement of the act by the officers of the State of California directly obstructs and burdens interstate and foreign commerce. Our affidavits substantially and persuasively support the facts alleged; and pending the trial and determination of the case the appellant will suffer, and are suffering, great and irremediable loss if the challenged provisions are enforced, and we believe that it is our right to have a temporary injunction.

It is respectfully submitted that the three-judge court erred in the particulars hereinbefore set out; that the interlocutory order should have been granted and that the decree appealed from should be reversed.

Respectfully submitted,

ROY DAILY,

Attorney for Appellant.